TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 22

EVELYN C. GARDNER, PETITIONER,

vs.

PANAMA RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 27, 1951.

CERTIORARI GRANTED MAY 21, 1951.

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[fol. 1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE, DIVISION OF BALBOA

No. 2097. In Admiralty

EVELYN C. GARDNER, Libelant,

-versus

PANAMA RAILROAD COMPANY, a Corporation, Respondent.

Appearances:

Van Siclen, Ramirez & de Castro, Proctors for Libelant. Box 945, Ancon, Canal Zone.

Paul A. Bentz, Paul M. Runnestrand, David J. Markun, Proctors for Respondent. Balboa Heights, Canal Zone.

LIBEL—Filed October 19, 1949

To the Honorable Joseph J. Hancock, Judge of the United States District Court for the District of the Canal Zone:

The libel and complaint of Evelyn C. Gardner, against the Panama Railroad Company, a corporation, in a cause of [fol. 2] tort or damage, civil and maritime, respectfully represents that:

1. The libelant, Evelyn C. Gardner, is a citizen of the United States of America and resides on the Canal Zone and within the Balboa Division of this Court.

2. The respondent, the Panama Railroad Company, is a corporation incorporated and existant by virtue of the laws of the United States, as of June 29, 1948; that prior to June 29, 1948, the respondent was a corporation incorporated and existant by virtue of the laws of the State of New York; that the respondent is a resident of the Southern District of New York and of the Canal Zone; that respondent is licensed and does business on the Canal Zone; that respondent maintains an office and place of business within the Canal Zone and within the Balboa Division of this Court.

3. That the respondent did, on or about the 3rd day of December, 1947, own, maintain, and operate under the American flag, as a common carrier of passengers and freight, a certain steamship denominated the S. S. Panama;

4. That prior to the 3rd day of December, 1947, the libelant purchased passage on the S. S. Panama for carriage of her person as a passenger from New York City to Cristobal, Canal Zone; that by virtue of the aforesaid purchase, the libelant boarded the S. S. Panama at New York City, on December 3, 1947, on which date the said ship, with the libelant on board, departed from New York City for *Cristobal*, Canal Zone.

[fol. 3] 5. That on the 3rd day of December, 1947, the libelant was in the bathroom of the stateroom numbered 108, assigned to her on board the S. S. Panama by the purser, which purser at the time acted in his capacity and within the scope of his authority, and in the furtherance of his duties as an employee of the respondent; that the said vessel was on the high seas; that the ship lurched suddenly; that the sudden lurch of the ship disequilibriated the libelant and she shifted her footing to regain her equilibrium; that as the libelant shifted her footing, as aforesaid, the heel of the shoe which libelant wore on her right foot struck a coaming 5¾ inches high adjacent to the place where the toilet bowl joined the floor, which coaming separated the floor of the shower compartment from the rest of the bathroom, and which coaming and shower compartment were obscured from the libelant's vision by a shower curtain; that the libelant was catapulated into a sitting position in the shower compartment and her head struck the wall of the said compartment; that in the course of the libelant's fall she grasped at the wall of the bathroom for support; that she failed to grasp the flat surface of the wall and grasped the shower curtain which was drawn completely across the opening into the shower compartment, as aforesaid, which shower curtain gave way with libelant's weight and failed to impede the libelant's fall.

6. That the fall of the libelant as aforesaid, was proximately caused by the negligence and carelessness of the respondent in that it maintained the said bathroom with 5¾ inch coaming on the floor, adjacent to the area necessary for the libelant or other users of the bathroom to stand while flushing the toilet, and that it maintained the bathroom in such a manner that the shower curtain obscured the coaming and entrance to the shower compartment when [fol. 4] drawn across the entrance to said compartment and in that it maintained the said bathroom without an

adequate distribution of grips for the purpose of manual support against disequilibration due to the movements of the ship upon the sea.

7. That because of the libelant's fall, as aforesaid, and proximately as a result of the negligence of the respondent, as aforesaid, the libelant suffered a ruptured cartilage disc in the area of her spine and suffered pain continuously from the 3rd day of December, 1947, until the present, to her damage in the sum of $10,000.

8. That because of the libelant's fall as aforesaid, and proximately as a result of the negligence of the respondent, as aforesaid; the libelant necessarily underwent medical treatment, hospitalization and a surgical operation to her damage in the sum of $117.00.

9. That on the 3rd day of December, 1947, and for several years prior thereto, the libelant was employed as a Court reporter and public stenographer with an income of $3,600.00 per year.

10. That because of the libelant's fall, and proximately as a consequence of the negligence of the respondent, the libelant was incapacitated from attendance to her work and employment from the 3rd day of December, 1947, up to and including the 23rd day of May, 1949, to her damage in the sum of $10,000.00.

Wherefore, libelant prays:

(a) That process in due form of law, according to the rules and practice of this Honorable Court, in causes of [fol. 5] admiralty and maritime jurisdiction, may issue against said respondent, Panama Railroad Company, a corporation, citing them to appear and answer, on oath, all and singular, the matters aforesaid;

(b) That after due proceedings had, this Honorable Court may be pleased to decree to libelant, and against respondent, Panama Railroad Company, a corporation, the damages suffered by libelant as aforesaid, with interest and costs and disbursements;

(c) That libelant have such other and further relief as in law and practice it may be entitled to receive.

Van Siclen, Ramirez & de Castro, (Signed) by Woodrow de Castro, Proctors for Libelant.

Duly sworn to by Evelyn C. Gardner. Jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

PLEA TO THE JURISDICTION OF THE SUBJECT MATTER—Filed November 23, 1949

The Honorable Judge of said Court:

For its plea to the jurisdiction of the Court over the subject matter in this cause of tort or damage, civil and maritime, respondent alleges as follows:

I

No cause of action in admiralty arose against the respondent from the injuries alleged in the libel herein, since, at the time of the injuries complained of, the Federal Tort Claims Act [now reenacted as secs. 2671-2680, and sec. 1246(b) of Title 28, U. S. Code] provided the exclusive judicial remedy for personal injuries caused by the negligence or wrongful act or omission of any officer or employee of the Panama Railroad Company.

II

This Court squarely held in the earlier civil action brought by libelant herein, as plaintiff therein, on essentially the same allegations of fact (Evelyn C. Gardner vs. The Panama Railroad Company, Civil No. 2807) that under section 423 of the Tort Claims Act [now reenacted by Congress as sec. 2679 of Title 28 U. S. C.] the Panama Railroad Company, being an agency of the United States Government, was not suable for torts committed by its officers and employees, and that any action for such torts was maintainable only against the United States in so far as permitted by the Tort Claims Act. Accordingly, plaintiff's civil action was dismissed by judgment of this Court dated October 7, 1948.

[fol. 7] III

The present suit, proceeding in admiralty, is no more maintainable against respondent than was the aforesaid civil action (Civil No. 2807), since under section 423 of the Tort Claims Act [now reenacted as sec. 2679 of Title 28, U. S. C.] suits on tort causes of a type cognizable under

the Act, which theretofore could have been brought against the respondent in proceedings in admiralty were, after the passage of that Act and at the time of the libellant's alleged injury, maintainable only against the United States under the provisions of said Act, for the reasons hereinbelow developed.

IV

It is clear that from and after August 2, 1946, the date of approval of the Tort Claims Act, suit on any claim cognizable under that Act can be brought only against the United States, in accordance with the terms of that Act, unless such claim is of a type specifically excepted by section 421 of that Act [now 28 U. S. Code, sec. 2680]. See Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

V

That the claim upon which this libel is based is one which is cognizable under the Federal Tort Claims Act has been settled beyond dispute by this Court's ruling in Evelyn C. Gardner vs. Panama Railroad Company, Civil No. 2807, and in Evelyn C. Gardner vs. The United States, Civil No. 2930, both of which actions were founded on essentially the same allegations of fact as those which form the basis for the present libel. In Gardner vs. The [fol. 8] United States, which action was brought under the Tort Claims Act, this Court's jurisdiction was not even questioned until after the enactment of Public Law 172—81st Congress, 1st Session, approved July 16, 1949, which amended the Tort Claims Act so as to except therefrom "* * * Any claim arising from the activities of the Panama Railroad Company." That amendment, of course, served to divest the Court of jurisdiction, and this Court so ruled, dismissing the case for lack of jurisdiction by Judgment dated October 14, 1949.

VI

It is equally clear that claims which prior to the Tort Claims Act were cognizable against the respondent in proceedings in admiralty were nowhere excepted from that Act prior to the enactment of said Public Law 172.

While subsection 421(d) [now reenacted as sec. 2680(d) of Title 28 U. S. C.] exempts

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States,"

that subsection does not exclude from the Tort Claims Act claims theretofore cognizable in admiralty against the respondent, since sections 781-790 of Title 46, U. S. Code, the Public Vessels Act, obviously do not apply to the respondent since it cannot be contended that respondent's vessels are "public vessels," i.e., vessels owned by the United States which are not engaged in trade or commerce, and, since section 741 of Title 46, U. S. Code, specifically exempts the respondent from the Suits in Admiralty Act [secs. 741-752 of Title 46, U. S. Code], in the following terms: "* * * Provided, That this chapter shall not apply to the Panama Railroad Company. * * *."

[fol. 9]

VII

There is no other exception contained in section 2680 of Title 28 of the U. S. Code which could reasonably be construed to except the claim upon which the present libel is founded from the Tort Claims Act. It follows that no cause of action against the respondent, in admiralty or otherwise, ever arose in favor of the libelant on the basis of the facts alleged by the libel herein.

VIII

That claims which prior to the Tort Claims Act were cognizable against the respondent by proceedings in admiralty were, after the passage of that Act, cognizable exclusively by actions against the United States under that Act, is further apparent from the legislative history of the above mentioned Public Law 172. House Report No. 830 on S. 1168, which was enacted as Public Law 172, contains the following language on page 4 thereof, quoting a letter from the Secretary of the Army to the Chairman of the House Committee on the Judiciary:

"Under title 28, United States Code, section 2679, the authority of a Federal agency to sue and be sued may no longer be construed to authorize suits against such agency

on claims on which suit is authorized by the Federal Tort Claims Act, and the remedies provided by the act are made exclusive. Although the act is made inapplicable to claims for which a remedy is provided by the Suits in Admiralty Act, the exclusion of the Panama Railroad from the coverage of that act operates to bring within the scope of the Tort Claims Act maritime claims against the Company which are not within the coverage of the Tort Claims Act as applied to other Government agencies. In addition, the provisions of the Federal Tort Claims [fol. 10] Act making exclusive the remedies provided by that act nullifies the application to employees of the Panama Railroad Company of the provisions of the Jones Act, the Longshoremen and Harbor Workers' Compensation Act, and the Federal Employers' Liability Act, thereby depriving such employees of the procedural and substantive benefits of such legislation representing policies of the Congress developed over a long period of years in reference to the handling of claims for injuries by employees in the maritime and railroad industries.

"The substitution of the Federal Tort Claims Act for the remedy provided by the Jones Act eliminates the injured seamen's choice of forum as between State and Federal Courts, and his right to jury trial, and substitutes a 1-year period of limitation for the 3-year period applicable under the Jones Act, thereby placing the seaman employed by the Panama Railroad Company in a comparatively disadvantageous position in reference to seaman employed on privately owned and operated vessels. These departures from the established policy of the Congress in reference to maritime and railroad employees appear not to have been within the contemplation of the Congress in the enactment of the Federal Tort Claims Act and further appear to be foreign to the general purposes of the act." (Emphasis added.)

IX

The enactment of Public Law 172-81st Congress, 1st Session approved July 16, 1949, which by specific amendment of section 2680 of Title 28, U. S. Code, excepts from the Tort Claims Act claims arising from the activities of the Panama Railroad Company, does not, of course, serve [fol. 11] to give libelant a cause of action against the respondent where no such cause of action existed at the

time the alleged injuries were sustained, since the effective date of said Public Law 172 must be presumed to be the date of its approval, there being no other effective date specified in the Act.

It is settled law that a statute takes effect from the time of its passage where no effective date is expressly fixed (Matthews vs. Zane, 20 U. S. 164, 7 Wheat. 164, 5 L. Ed. 425 (U. S. Ohio, 1822); Warren Mfg. Co. vs. Etna Ins. Co., Fed. Cas. No. 17,206, 2 Payne 501 (C. C. Conn., 1832). See generally cases cited in section 255 of Title 59 (Statutes) of the Federal Digest at page 634, et seq. Under section 7 of Article 1 of the United States Constitution, providing that every bill after passing the House of Representatives and the Senate shall, before it becomes a law, be presented to the President, and if he approves it he shall sign it, a bill takes effect as law the time of such approval by the President. In re Richardson, Fed. Cas. No. 11,777, 2 Storey 571, 6 Law Rep. 392 (C. C. Mass. 1843); Bristol Mfg. Corp. vs. U. S., 2 Fed. Supp. 781 (Ct. Cl. 1933).

The general rule that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, is well settled. Brewster vs. Gage, 50 Sup. Ct. 115, 280 U. S. 327, 74 L. Ed. 457. See generally cases cited under section 263 of Title 59 (Statutes) of the Federal Digest at page 637 et seq. The United States Supreme Court has held that laws are not to be construed as applied to cases which arose before their passage, unless that intention be clearly declared. Shwab vs. Doyle, 42 Sup. Ct. 391, 258 U. S. 529, 66 Lawyers' Ed. 747, 26 A. L. R. 1454. It has been held that retroactively, even where permissible, is not favored [fol. 12] except on the clearest mandate. Claridge Apts. Co. vs. Commissioner of Internal Revenue, 65 Sup. Ct. 172, 232 U. S. 141, 89 L. Ed. 139. There is an almost conclusive presumption against the power to take retroactive action under a statute unless Congress plainly specifies such power. Trans. & Western Air vs. Civil Aeronautics Board, 169 Fed. 2d 893, 83 U. S. Ap. D. C. 358 (C. A. D. C. 1948). A statute, to be construed as operating retrospectively, must not only clearly appear to so operate, but its retrospective character must be derived from the unequivocal import of the terms and manifest intention of the legislature U. S. vs. McKinney, 107 Fed. 2d 879 (C. C. A. Ohio,

1939). This rule against the retroactive application of statutes applies fully as strongly to amendatory Acts as it does to statutes generally. Dodge vs. Nevada National Bank of San Francisco, 109 Fed. 726, 48 C.C. A. 626 (C. C. A. Cal., 1901), holding that an amendatory Act could not be given retroactive effect in the absence of language so declaring, even though it was the intention of the supporters of the bill that it should operate retroactively.

X

Briefly summarized, the position asserted by the respondent in this plea to the jurisdiction is:

(1) That no cause of action, at law or in admiralty, ever existed against the respondent Panama Railroad Company on the basis of libelant's alleged injuries on or about December 3, 1947, because (a) at that time any cause of action arising therefrom either at law or in admiralty was necessarily and exclusively against the United States under the Tort Claims Act; and (b) Public Law 172, 81st Congress, approved July 16, 1949, excluding the Panama Railroad Company from the Tort Claims Act, has pro-
[fol. 13] spective effect only and does not retroactively create any cause of action against the respondent and, of course, could not "revive" a cause of action that never existed.

(2) That this Court's decision of October 7, 1948, supporting the above position specifically as to the nonexistence of any action at law against the respondent (Civil No. 2807, Evelyn C. Gardner vs. Panama Railroad Company), is controlling in all respects as to the present attempt to assert the same cause of action in admiralty, since admiralty proceedings against the Panama Railroad Company were not excepted from the Tort Claims Act and any such cause of action in admiralty against the Company, as in the case of the attempted tort action at law as held in Civil No. 2807, was therefore cognizable under the Tort Claims Act, which furnished the exclusive remedy and negatived the existence of any cause of action against the Panama Railroad Company.

XI

Wherefore, the premises considered, the respondent prays the Court that the libel herein be dismissed.

(Signed) Paul A. Bentz, Paul M. Runnestrand, David J. Markun, Proctors.

Duly sworn to by Paul A. Bentz. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

FINDINGS ON EXCEPTIONS TO ANSWER IN ADMIRALTY—Filed February 13, 1950

This action in Admiralty by Evelyn C. Gardner against Panama Railroad Company is based upon the claim by libelant that while she was a passenger on a ship owned and operated by respondent, that through the negligent maintenance of the bathroom which was a part of her stateroom she sustained certain alleged personal injuries. Prior to the institution of the above admiralty proceedings, and on April 10, 1948, Action No. 2807 was instituted in this Court and in common law against the Panama Railroad Company. The Panama Railroad answered, pleading that it was an instrumentality or agency of the United States, and under and by virtue of an Act of Congress approved August 2nd, 1946 (known as the Federal Tort Liability Act) that the United States had consented to suit on claims on account of personal injury caused by negligence or wrongful act or omission of any employee of the Panama Railroad Company, or Federal Agency of the United States, and that such act had superseded any right of action against the Panama Railroad Company.

[fol. 15] Against this plea a motion to strike was directed. The motion to strike was overruled under authority of Wickman vs. Inland Waterways Corporation, 78 Federal Supplement 284. Thereafter, the plaintiff declining to plead further, the action was dismissed with the expressed views that under the provisions of the Federal Tort Liability Act the Court was without jurisdiction over the Panama Railroad Company.

On November 29, 1948, Evelyn C. Gardner, now libelant in this Admiralty Proceeding, instituted under the Federal

Tort Liability Act her action against the United States. Answer was filed, joining issue, without being assigned for trial. On July 16, 1949, Congress amended the Federal Tort Liability Act by inserting as an additional exception to the application of such Act sub-paragraph "M", which amendment excepted from the operation of that Act any claim arising from the activities of the Panama Railroad Company. On September 14, 1949, a motion for dismissal was filed. On October 14, 1949, that motion was sustained, the basis being lack of jurisdiction.

This Action in Admiralty was filed October 19, 1949, against the Panama Railroad Company. A plea to the jurisdiction of the Admiralty proceedings was filed, asserting that on December 3, 1947, the date of the alleged occurrence of libelant's claimed injuries, that the only remedy then existing for enforcing the libelant's cause of action was that prescribed and provided for by the Tort Liability Act, and that under and by virtue of Chapter 340, Public Law, 172, approved July 16, 1949, that the exemptions or limitations contained in the Tort Liability Act were amended, excluding from the operation of the Act any claim arising from the activities of the Panama Railroad Company; and that by reason of that amendment [fol. 16] there was withdrawn from libelant all remedies or proceedings for enforcing her cause of action as against the United States, and none exists for enforcing libelant's cause of action against the Panama Railroad Company.

It cannot be questioned but that under the Tort Liability Act as originally enacted, and prior to the amendment approved July 16, 1949, that the remedy for enforcement of libelant's cause of action was confined exclusively against the United States. However, under that amendment, all remedies or proceedings against the United States under that Act in reference to Panama Railroad Company were withdrawn. The right of the United States to withdraw at any time its statutory waiver of its sovereign immunity from suit cannot be questioned, and this result raises the question whether by reason of such withdrawal, in reference to suits against the Panama Railroad Company, and a restoration to the United States of such immunity, restored to libelant the remedy of enforcing her pre-existing right against the Panama Railroad Company.

Libelant's injuries, received while she was on a vessel owned and operated by the Panama Railroad Company, and inflicted through some alleged negligent failure of the Railroad, constituted an invasion of the primary rights of libelant, thereby vesting in libelant an election of proceedings to enforce that right, if in law or by statute there is a remedy provided by which it may be pursued to preserve to a litigant the relief to which he is entitled. This invasion of a primary right is often referred to as a "right of action." As stated in Dennison vs. Payne, 293 Federal Reporter 333-343:—

[fol. 17] "The cause of the injury upon which the right of action is founded is not the cause of action itself, but is only one element in the cause of action. Chief Justice Fuller in Chesapeake & Ohio Ry. Co. vs. Dixon, 179 U. S. 131-139, defined the phrase 'cause of action' saying that it 'manifestly' comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to 'traverse'. A cause of action comprehends the primary right possessed by the plaintiff, and the corresponding primary duty resting upon the defendant in breach of such primary right and duty. The cause of action is something distinct from the remedy or the relief sought. The remedy is simply the means by which the cause of action is satisfied. Volume 1, American Jurisprudence, Page 405, Section 3."

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. (Baltimore S. S. Co. vs. Philipps, 274, U. S. 316).

The Court in the above case, quoting from the case of Chobanian vs. Washburn Wire Co., 33 P. I. 289-80 A. 394. Amm. Cases 1913 D. 730 said:—

"The facts are merely the means and not the end. They do constitute the cause of action, but show its existence by making the wrong appear. The thing, therefore, which in contemplation of law, as its cause, becomes a ground for action, is not the group of facts alleged in a declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."

Adopting the above referred to rules of law as the correct law governing the claim of libelant, upon libelant

[fol. 18] being injured there was acquired a vested right of action in favor of libelant and against the one invading that primary right. If libelant's right of action had accrued prior to the passage of the Tort Liabiliay Act, libelant's remedy for enforcing her right would have been against the Panama Railroad. However, that remedy had been changed by an Act of Congress in 1946, which is referred to as the "Federal Tort Claims Act." Under that Act, which was existing at the date on which libelant's claimed injuries occurred, the United States waived its sovereign immunity from suit on "claims based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not either valid, or based upon the exercise or performance, or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused." In addition to such waiver of immunity, the procedure or remedy for the enforcement of such claims is provided for as follows:

"From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under Part 3 of this title, and the remedies provided by this title in such cases shall be exclusive."

Prior to the amendment approved July 16, 1949, it appearing that a majority of the stock of the Panama being owned by the United States, and whose corporate functions were those of an agency of the United States, it was held that such circumstances brought the Panama Railroad Company within the statutory definition as a "Federal agency."

[fol. 19] By reason of that statutory classification, the remedy of libelant to proceed against the Panama Railroad Company was taken, and in lieu thereof a remedy was provided which limited libelant to the exclusive remedy of proceeding against the United States only.

Before libelant's rights could be adjudicated under the remedies provided for under the Federal Tort Liability Act, and as against the United States, the Secretary of the Army, with the concurrence of Hon. Douglas McGregor, the Assistant to the Attorney General, directed letters to

the Judicial Committee recommending that the Federal Tort Liability Act be amended so as to exclude therefrom claims against the Panama Railroad Company, (See Legislative History of 81st Congress, House Report No. 830, of June 15, 1949, as enacted under Public Law 172). Upon that recommendation, Congress amended the Federal Tort Liability Act by addition to the exceptions from application of such act of paragraph "M", which was approved July 16, 1949, and is as follows:—

"Section 2680 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"(M) Any claim arising from the activities of the Panama Railroad Company."

Under the above amendment the remedy of libelant to prosecute her right of action against the United States was withdrawn.

The Court is of the opinion that from the time of libelant's alleged injuries there was a vested right of action; that the enactment of the Federal Tort Liability Act did not divest libelant of her right of action; that the existing [fol. 20] remedies for the enforcement of her right of action was only enlarged under the Federal Tort Liability Act! and that upon the withdrawal of that remedy and before her right of action was adjudicated, libelant's remedy under the common law to proceed against the Panama Railroad Company was reestablished, and now exists.

Respondent's plea to the jurisdiction is denied, and the motion to dismiss is overruled.

Dated: Feb. 13, 1950.

(S) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING RESPONDENT'S MOTION TO DISMISS—Filed February 15, 1950.

This cause having come on for hearing on January 5, 1950, on Respondent's plea to the jurisdiction of the subject matter and motion for dismissal of the action, and the Court having heard the arguments of Counsel for the respective parties, and having ordered the case continued

pending the filing of briefs, and briefs having been filed by the respective parties, and the cause having been submitted to the Court on January 26, 1950, and the Court having considered the briefs and the authorities cited by both parties, and having considered the other pleadings and motions heretofore filed herein, it is hereby

Ordered, Adjudged, And Decreed, that Respondent's plea to the jurisdiction of the subject matter be denied and [fol. 21] Respondent's motion for the dismissal of the action be overruled.

Dated: February 15, 1950.

(S) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 27, 1950.

To the Honorable Judge of said Court:

For its Answer to the libel of Evelyn C. Gardner, in a cause of tort or damage, civil and maritime, the respondent, Panama Railroad Company, alleges on information and belief as follows:

First: Respondent admits the allegations contained in the first paragraph of the libel.

Second: Respondent admits the allegations contained in the second paragraph of the libel.

Third: Respondent admits the allegations contained in the third paragraph of the libel.

Fourth: Respondent admits the allegations contained in the fourth paragraph of the libel.

Fifth: Respondent admits that Stateroom 108 of the SS Panama was assigned to libelant by the ship's purser, who in doing so acted in that capacity and within the scope of his authority, and in the furtherance of his duties [fol. 22] as an employee of the respondent; admits that the said vessel was on the high seas on the 3rd day of December, 1947; and admits that a coaming 5¾ inches high separated the floor of the shower compartment from the rest of the bathroom of said stateroom. Respondent denies that the coaming was obscured from libelant's vision by a shower curtain. Except as above admitted or denied, respondent

is without knowledge or information sufficient to form a belief as to the allegations contained in the fifth paragraph of the libel, and therefore denies such allegations.

Sixth: Respondent admits that there was located in the bathroom of Stateroom 108 of the SS Panama at the time of the alleged injuries a coaming 5¾ inches high surrounding the shower area of said bathroom. Except as above admitted, respondent denies the allegations contained in the sixth paragraph of the libel.

Seventh: Respondent denies the allegations contained in paragraph seven of the libel.

Eighth: Respondent specifically denies that the libelant's fall was proximately caused as a result of any negligence of the respondent, and specifically denies that there was any negligence of the respondent. Except as above denied, respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the eighth paragraph of the libel, and therefore denies such allegations.

Ninth: Respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the ninth paragraph of the libel, and therefore denies such allegations.

[fol. 23] Tenth: Respondent specifically denies that the libelant's fall was proximately caused as a consequence of any negligence of the respondent, and specifically denies that there was any negligence of the respondent. Except as above denied, respondent is without knowledge or information sufficient to form a belief as to the allegations contained in the tenth paragraph of the libel, and therefore denies such allegations.

Eleventh: Further answering the libel, and as a complete defense thereto, respondent alleges that libelant's alleged injuries were not caused or contributed to by any fault or neglect of the respondent but were caused instead solely by libelant's own negligence in that, among other things:

(a) Libelant knew or should have known that the seas were rough at the time of the alleged injuries;

(b) Libelant stood up to flush the toilet when she could have remained seated while doing so; and

(c) Libelant did not avail herself to the supports and handholds which were available for use in the bathroom and which were easily within her reach from either a sitting or a standing position.

Twelfth: Further answering the libel and as a separate defense thereto, respondent alleges that, assuming without admitting any negligence on the part of the respondent, libelant's alleged injuries were proximately contributed to by libelant's own negligence in the same respects alleged by respondent in the next preceding paragraph of this answer.

[fol. 24] Thirteenth: Further answering the libel and as a separate and complete defense thereto, respondent alleges that libelant knew, or in the exercise of ordinary care should have known, the state of the seas and the movements of the vessel, and the condition of the bathroom in libelant's stateroom, and knew, or in the exercise of ordinary care should have known, the hazards and risks incident to her moving or standing within said bathroom in view of such known facts, and libelant voluntarily assumed such hazards and risks.

Fourteenth: Further answering the libel and as a separate and complete defense thereto respondent alleges that the same is barred by the admiralty doctrine of laches, it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries, and the applicable statute of limitations in tort causes of action in the Canal Zone being one year, as prescribed by subsection 3 of section 87 of title 4 of the Canal Zone Code.

Fifthteenth: That all and singular the premises are true.

Wherefore, respondent prays that the libel herein be dismissed with prejudice, that libelant take nothing from respondent in this suit, and that the respondent have judgment for its costs and disbursements herein.

Paul A. Bentz, Paul M. Runnestrand, David J. Markun, (Signed) By Paul A. Bentz, Proctors for Respondent.

Balboa Heights, Canal Zone.

[fol. 25] *Duly sworn to by F. K. Newcomer. Jurat omitted in printing.*

[fol. 26] IN UNITED STATES DISTRICT COURT

MINUTES OF MARCH 9, 1950

This case coming on regularly for the purpose to hear oral arguments of proctors on the question of laches, the libelant appears by proctor Woodrow de Castro, and the respondent appears by proctor David Markun.

Proctors for the parties orally stipulate that the purpose of the hearing at this time is only on the question of laches, and further orally stipulate that Civil Cases No. 2807 and 2930 of record in this Court are made a part of this record only on the question of laches. The Court thereupon directs proctors for the parties to file a written stipulation herein.

The Court having heard the statements and arguments of proctors, Orders that the issue as to laches will be submitted to the Court upon the filing of the written stipulation by proctors.

Proctor for Respondent files a brief in support of the prayer for dismissal on the ground of laches. Proctor for libelant states that he will file his brief or authorities within the next few days.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed March 13, 1950

It is hereby stipulated by and between Woodrow de Castro, of proctors for libelant, and David J. Markun, of proctors for respondent that the issues of law and fact raised in, and by virtue of, the Fourteenth paragraph of [fol. 27] respondent's answer to the libel filed herein be tried separately and apart from the other issues, both of law and fact, raised by the pleadings, and that the said issues raised by the Fourteenth paragraph of respondent's answer be heard by the Court on March 9, 1950, and it is further

Stipulated by and between the proctors for the respective parties that the entire records of cases #2807 Civil, Evelyn C. Gardner, plaintiff vs. Panama Railroad Company, a corporation, defendant, and #2930, Civil, Evelyn C. Gardner vs. United States of America, be introduced and made a part of the record of this cause at this time, for the purpose of the present hearing only.

(Signed) Woodrow de Castro, Of Proctors for Libelant. (Signed) David J. Markun, Of Proctors for Respondent.

IN UNITED STATES DISTRICT COURT

OPINION—Filed April 3, 1950

This is an action in admiralty, filed in this Court October 19th, 1949, libelant alleging that on December 3rd, 1947, she was a passenger on respondent's vessel, S. S. Panama, and, that through the negligence of respondent, libelant sustained certain alleged personal injuries. Respondent entered a plea questioning the jurisdiction of the subject matter. This was overruled as per order entered February 13, 1950. (See Opinion of Court filed.)

[fol. 28] Respondent filed its answer on February 27, 1950, and under paragraph 14 thereof alleges as a separate and complete defense by way of bar the doctrine of laches; the substance of that paragraph being:—

"Further answering the libel and as a separate and complete defense thereto respondent alleges that the same is barred by the admiralty doctrine of laches, it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries, and the applicable statute of limitations in tort causes of action in the Canal Zone being one year, as prescribed by subsection 3 of Section 87 of Title 4 of the Canal Zone Code."

As a pre-trial procedure, and for the purpose of determining, before trial of other issues, the effect of the plea of laches, proctors have entered into and filed an agreed stipulation to the effect that the issue of law and fact raised by virtue of the 14th paragraph of respondent's answer to the libel be tried separately and apart from the other issues of law and fact presented by the pleadings.

The sufficiency of such paragraph and plea, and whether the allegations contained therein constitute a bar to the maintenance of libelant's right of action, is now before the Court for determination. The rule is well established that there is no independent statute of limitations for suits in admiralty. However, the existence of facts and circumstances constituting laches, occurring between the accrual of a right of action and the institution of proceedings to enforce such right of action, may be considered and applied as a bar to the maintenance of such right of action. In determining the effect of any claimed laches, the Court will be guided by the statutes of limitation applicable to actions

similar to those asserted in such *da*miralty proceedings. [fol. 29] It will be noted that respondent pleads no specific acts as a basis for the claim of laches, but relies entirely on the allegation—

"... it appearing on the face of the libel that this suit was commenced more than one year after the date of the alleged injuries."

Under that specific and only allegation, libelant pleads the application of the Canal Zone Statutory Limitation of one year.

The allegations of the libel are that libelant was injured December 3, 1947, and this action in admiralty was filed October 19, 1949, one year, ten months, and seventeen days after the accrual of libelant's cause of action. The Fifth Circuit Court of Appeals, in the case of United States vs. Alex Dussell Iron Works, 31 Fed. (2) 535, had under consideration the sufficiency of allegations similar to those contained in the answer filed in case at bar. The sufficiency of the pleadings was tested by respondent filing exceptions to libelant's plea of laches. The Court, through Judge Grubb, said:—

"We think the defense of laches under the admiralty practice, as in equity, is as a rule properly presented by answer only and not by exception. This is certainly true, unless the libel on its face shows laches as a matter of law. Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time. The libel in this case charges that the cause of action arose March 7, 1920; that demand was made April 2, 1923; and that the libel was filed April 22, 1926. It also shows that respondent, [fol. 30] through its counsel, answered libelant's demand on April 14, 1923, by denying liability for the fire that caused the damage sought to be recovered by libelant. It also sets out libelant's efforts to locate eye witnesses to the starting of the fire, and its inability to find any until March 5, 1926, when it first discovered an eye witness, who would testify that the fire was caused by a heated rivet negligently dropped by an employee of respondent into the cargo of sugar on the ship of libelant. We do not think that the libel shows laches as a matter of law, unless it can be implied

from the delay of six years. Differing from prescription, time alone is not enough to show laches. The circumstances and the equities of the parties must be as well considered. The Key City, 14 Wall. 653, 20 L. Ed. 896. Laches is an affirmative defense, and, unless appearing upon the face of the pleadings, must be asserted by the answer of the respondent. If the exception be construed to present the defense of laches, we think it should have been presented by answer, and that the District Court erred in sustaining the exception of prescription or laches and in dismissing the libel. This results in a reversal of the decree of dismissal."

See also Loverick vs. Warner Co., 118 Fed. (2) 690-693.

The purport of the above decisions is that lapse of time alone, without asserting or pleading other facts or circumstances in connection therewith, is insufficient to constitute the plea of laches as a matter of law, and therefore insufficient to stand the tests of an exception or a demurrer. However, there is an exception to the above rule; that is, where the facts other than lapse of time appear on the face of the pleadings, or are within the judicial knowledge of the Court, such facts constituting laches need not be pleaded. [fol. 31] California Casualty Indemnity vs. United States, 74 Fed. Supp. 408.

The pleadings filed herein contain no facts other than lapse of time, and without other claimed facts do not constitute laches as a matter of law, and are insufficient to state a proper defense to libelant's cause of action. No facts other than lapse of time are available from the pleadings, and none shown from which the Court can take judicial knowledge. However, assuming, but not deciding, respondent may have the right to amend that part of its answer pleading facts constituting laches. Assuming further that an amended answer is filed, and such amendment contains sufficient facts to constitute in law a plea of bar by laches, respondent's position under the law as hereinafter referred to would be of no greater advantage to respondent than that afforded under law as found herein.

Libelant's injuries were sustained December 3, 1947, at which time her cause of action became vested. Under the law and for the purpose of enforcing her right of action she could proceed by an action in common law or by an action in admiralty. The period of time within which to proceed by common law was limited by sub-section 3 of

Section 87 of Title 4 of the Canal Zone Code to one year, whereas, under admiralty, an action could be instituted at any time before being barred by laches, but within the statutory period of one year (The Action in Admiralty Act not applying in the Canal Zone). The fact of libelant's alleged injury having occurred on December 3, 1947, and this action in admiralty having been filed October 19, 1949, aggregating a period of one year ten months and seventeen days, libelant's remedy of enforcing her right of action by admiralty proceedings subjected such remedy to the statutory limitations governing actions in common law, and [fol. 32] therefore, under sub-section 3 of Section 87 of Title 4 of the Canal Zone Code, Libelant's admiralty action is now barred by that statute and is not maintainable.

The above reasoning is supported by the case of McGrath vs. Panama Railroad Company, an opinion of the Fifth Circuit Court of Appeals, reported in 298 Federal Reporter, pages 303 and 304, wherein Judge Grubb said:

"The applicable statute of limitations for actions at common law for personal injuries in the Canal Zone is one year from the date of the injury. The limitation of three years, which obtains under the Code of Colombia, was superseded by the repealing clause of the legislation and executive orders, which put into effect the Canal Zone Code of Civil Procedure. Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in Courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred.

"(2, 3) The appellant suggests than no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of [fol. 33] limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the pre-

sumption of injury, until the contrary is shown. The appellant relies also upon erroneous advice given her by her counsel in Panama as to the applicable statute of limitation, namely, the statute of three years under the Code of Colombia, as being a circumstance that would make it inequitable for a Court of equity to follow the common-law limitation. In view of the fact that the limitation of one year was prescribed by the Canal Zone Code of Civil Procedure, we do not think that the mistake of counsel was sufficient to justify a Court of admiralty in departing from the analogy of the statutory limitation."

This Court has not lost sight of the fact that libelant in this case filed on April 10, 1948, her Action No. 2807 in common law. In that proceeding an order was entered directing the dismissal of that action. (See Action No. 2807.) On November 29, 1948, libelant instituted action in common law, under Action No. 2930. That action was likewise ordered dismissed by the Court for want of jurisdiction. (See Action No. 2930.) This present action in admiralty, No. 3097, was instituted on October 19, 1949.

Notwithstanding the dismissal of Actions 2807 and 2930, libelant in this case had the right until December 2, 1948, to proceed either in common law or by admiralty, but such right expired thereafter. In view of that failure, no facts or circumstances in her favor can prevent the running of the statutory limitation of one year.

See Marshall vs. International Mercantile Marine Company, 39 Fed. (2) 551.

[fol. 34] An order will be entered dismissing the libel in admiralty herein, with exceptions to libelant.

Apr. 3, 1950.

(Signed) Joseph J. Hancock, Judge.

cc/All parties. File.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed and Entered April 6, 1950

The defense of laches, raised by the fourteenth paragraph of respondent's answer, having been duly submitted to the Court by stipulation of the parties, and upon the

pleadings, briefs, and oral argument of proctors for libelant and respondent, and the Court being fully advised in the premises;

Now, Therefore, it is adjudged that the aforesaid defense be and hereby is sustained, and it is ordered, adjudged, and decreed that the libel herein be and hereby is dismissed and that plaintiff take nothing by this suit; to all of which libelant excepts.

(Signed) Joseph J. Hancock, Judge.

Dated April 6, 1950.

[fol. 35] In United States District Court

Notice of Appeal—Filed April 14, 1950

To The Honorable Clerk of the United States District Court for the District of the Canal Zone and to Paul A. Bentz, Paul M. Runnestrand and David J. Markun, Esqs. Proctors for Respondent:

Please take notice that the libelant, Evelyn C. Gardner, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment rendered by this, the United States District Court for the District of the Canal Zone, entered on the 6th day of April, 1950, in favor of the respondent and against the libelant, sustaining the defense of laches interposed by the said respondent to the libel and dismissing the said libel.

(Signed) Woodrow de Castro, of Proctors for Libelant.

In United States District Court

Stipulation—Filed May 15, 1950

Pursuant to Rule 49 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court of the United States, and Rule 12 of the Rules of the United States Court of Appeals for the Fifth Circuit, and for the purpose of limiting the record, which is to be transmitted to the Court of Appeals for the Fifth Circuit in this appeal, to those times necessary to a disposition of

the issues presented on appeal and to clarify certain por-
[fol. 36] tions of the record which will be transmitted, it is hereby stipulated by and between the parties hereto, by their respective proctors, that:

I. The cases of Evelyn C. Gardner, plaintiff, vs. the Panama Railroad Company, a corporation, defendant, Civil No. 2807, and Evelyn C. Gardner, plaintiff, vs. the United States of America, defendant, Civil No. 2930, both of which were litigated in the above captioned Court, and the records of which have been incorporated in the above-entitled case by stipulation of the parties filed March 13, 1950 for the purpose of determining the issue of laches raised in the above styled case, were both brought by the libelant herein, and the alleged cause of action in each of them was founded upon the same injury which forms the basis for the alleged cause of action in the above entitled case.

II. Of the record in said actions, i.e., Civil No. 2807 and Civil No. 2930, only the respective judgments entered therein shall be included by the Clerk of the above-captioned Court in making up the record to be transmitted to the Court of Appeals for the Fifth Circuit.

(Signed) Woodrow de Castro, of Proctor for Libelant-Appellant. (Signed) Paul A. Bentz, of Proctor for Respondent-Appellee.

[fol. 37] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS

(Filed May 15, 1950)

The libelant-appellant, Evelyn C. Gardner, appeals from the judgment and order of the Court of April 6, 1950, sustaining the respondent-appellee's defense of laches and thereupon dismissing the libel.

Van Siclen, Ramirez & de Castro, (Signed) By Woodrow De Castro, Proctor for Appellant.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed May 15, 1950)

The appellant herein, Evelyn C. Gardner by Van Siclen, Ramirez & de Castro, her proctors designates the following portions of the record of the above captioned cause for inclusion in the record to be submitted to the United States Circuit Court of Appeals for the Fifth Circuit:

1. The judgment of the United States District Court for the District of the Canal Zone, Balboa Division, in the case of Evelyn C. Gardner, Plaintiff v. The Panama Railroad Company, a corporation, defendant, Civil No. 2807, entered therein on October 7th, 1948, the record of which case has heretofore been made a part of the record of the case at bar for certain purposes pertinent to this appeal.

[fol. 38] 2. The judgment of the United States District Court for the District of the Canal Zone, Balboa Division in the case of Evelyn C. Gardner, Plaintiff v. The United States of America, Defendant, Civil No. 2930, entered therein on October 14th, 1949, the record of which case has heretofore been made a part of the record of the case at bar for certain purposes pertinent to this appeal.

3. The Libel.

4. The Answer.

5. The Stipulation of the parties entered into on March 13, 1950.

6. The Minutes of March 9, 1950.

7. The Judgment dated April 6, 1950.

8. The Notice of Appeal.

9. Stipulation of parties dated May 15, 1950.

Van Siclen, Ramirez & de Castro, (Signed) By Woodrow de Castro, Proctors for Appellant.

[fol. 39] IN UNITED STATES DISTRICT COURT

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

(Filed May 18, 1950)

Whereas, on May 15, 1950, Libelant-Appellant in the above-entitled suit filed in the above-entitled Court a Desig-

nation of Contents of Record on Appeal, and a Statement of Points, presumably pursuant to Rule 75 of the Rules of the United States Court of Appeals for the Fifth Circuit:

And notwithstanding Respondent-Appellee's understanding and belief that the record on appeal in admiralty cases is necessarily for preparation under the express provisions of Rule 49 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court of the United States, as adopted and incorporated by Rule 12 of the Rules of the United States Court of Appeals for the Fifth Circuit; that such record should include all items required to be included by said Rule 49, except to the extent that the parties to the appeal may agree by written stipulation that certain items may be omitted therefrom; that the parties should thereafter enter into a stipulation settling the record thus prepared; that the Clerk of the above-entitled Court would thereupon certify the record thus prepared and settled; and that therefore no designations should be required in this appeal;

Appellee Hereby Designates the following additional contents for inclusion in the record on appeal:

1. Respondent-Appellee's Plea to the Jurisdiction of the Subject Matter, filed November 23, 1949;

[fol. 40] 2. "Findings on Exceptions to Answer in Admiralty," being an opinion and order of the Court denying Respondent-Appellee's Plea to the Jurisdiction of the Subject Matter and overruling the motion to dismiss, filed February 13, 1950;

3. Order overruling Respondent-Appellee's Motion to Dismiss, filed February 15, 1950;

4. Opinion Directing Order of Court, filed April 3, 1950;

5. Libelant-Appellant's Designation of Contents of Record on Appeal, filed May 15, 1950;

6. Libelant-Appellant's Statement of Points, filed May 15, 1950;

7. Respondent-Appellee's Cross-Assignment of Errors, filed on the date of filing this designation; and

8. This designation.

(Signed) Paul A. Bentz, Of Proctor for Respondent-Appellee.

In United States District Court

Appellee's Cross-Assignment of Errors Cross-Statement of Points

(Filed May 18, 1950)

The Respondent-Appellee hereby serves notice that on the appeal of the above-entitled suit it will rely for an affirmance of the Court's judgment of April 6, 1950, dismiss-[fol. 41] in the libel, not only upon the ground stated in said judgment, to-wit, that the suit is barred by laches, but also on the ground that the Court is without jurisdiction over the subject matter of the suit for the reasons stated in Respondent's Plea to the Jurisdiction of the Subject Matter pleaded in this suit;

And Therefore, assigns as error the order of the District Court dated February 15, 1950, overruling Respondent's Motion to Dismiss for lack of jurisdiction over the subject matter, on the ground that the Court's order was erroneous as a matter of law.

(Signed) Paul A. Bentz, Of Proctor for Respondent-Appellee.

In United States District Court

Judgment

(Filed October 7, 1948)

No. 2807, Civil

The defense raised by the second paragraph of defendant's answer, namely, that the Court is without jurisdiction of the defendant and the subject matter because of the applicability of the Federal Tort Claims Act to this cause of action, having been duly submitted to the Court on September 10, 1948, upon plaintiff's motion, as subsequently amended, to strike said second paragraph, and upon the pleadings, briefs and arguments of counsel for plaintiff and defendant, and the Court being fully advised in the premises;

[fol. 42] Now, Therefore, it is adjudged that the aforesaid defense be and hereby is sustained and it is ordered,

adjudged, and decreed that the complaint herein be and hereby is dismissed and that plaintiff take nothing by this action; to all of which the plaintiff excepts.

Dated Oct. 7th, 1948.

(Signed) Joseph J. Hancock, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT

(Entered October 14, 1949)

Civil No. 2930

This cause, having been filed on November 29, 1948, under the Federal Tort Claims Act, Public Law 773, 80th Congress, approved June 25, 1948, and effective September 1, 1948, seeking damages for personal injuries allegedly sustained by plaintiff while she was a passenger on the SS Panama, a vessel owned and operated by the Panama Railroad Company, came on regularly on October 7, 1949, upon defendant's motion, filed September 14, 1949, for dismissal of said cause for want of jurisdiction, and Charles E. Ramirez, Esquire, appearing as attorney for the plaintiff, and Rowland K. Hazard, Esquire, Assistant United States Attorney for the District of the Canal Zone, appearing as attorney for the defendant, and counsel for the plaintiff having stated to the Court that he neither opposes or consents to defendant's motion for dismissal, and counsel for the defendant having filed on September 22, 1949, in the Court a memorandum in support of said [fol. 43] motion to dismiss, said motion was submitted to the Court without oral argument and taken under advisement for decision, and it appearing before trial of said cause the Federal Tort Claims Act was amended on July 16, 1949, by adding subsection "m" to Section 2680 of Title 28, United States Code, which excludes jurisdiction of maintaining an action against the United States Government in reference to "any claim arising from the activities of the Panama Railroad Company," and the Court being fully advised in the premises and having by opinion dated October 13, 1949, sustained defendant's motion to dismiss with exception to plaintiff, now,

On motion of Rowland K. Hazard, Esquire, Assistant United States Attorney,

It is hereby ordered, adjudged and decreed:

1. That plaintiff's cause is dismissed for want of jurisdiction with exception to the plaintiff.

2. That plaintiff's cause is stricken from the docket.

(Signed) Joseph J. Hancock, Judge.

Dated this 14 day of October, 1949.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

SUBMISSION OF THE CASE UPON THE RECORD AND BRIEFS ON FILE, ON JOINT REQUEST OF COUNSEL

Extract from the Minutes of November 8, 1950

No. 13259

EVELYN C. GARDNER
versus
PANAMA RAILROAD COMPANY

The above entitled and numbered cause was taken under submission by the Court upon the record and briefs on file, without oral argument, on the joint request of counsel.

[fol. 46] OPINION OF THE COURT—Filed December 14, 1950

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13,259

EVELYN C. GARDNER, Appellant,
versus
PANAMA RAILROAD COMPANY, Appellee

Appeal from the United States District Court for the Canal Zone

(December 14, 1950)

Before Hutcheson, Chief Judge, and McCord and Borah, Circuit Judges.

HUTCHESON, Chief Judge:

Brought in admiralty[1] by a libel *in personam* filed October 19, 1949, the suit was for damages for injuries sus-
[fol. 47] tained by appellant (libellant below) on Dec. 3,

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[1] Two prior suits had been brought at law by libellant based on the same injuries. One of these, filed April, 1948, against the respondent, was dismissed on Oct. 7, 1948, for

1947, while a passenger on board the steamship "Panama", a vessel owned, maintained, and operated by appellee (respondent below).

Respondent, alleging that no cause of action in admiralty arose because at the time of the occurrence complained of, the Federal Torts Claim Act provided the exclusive judicial remedy, moved to dismiss the cause.

The court, on full consideration, overruled this motion, and the respondent answered, pleading, among other defenses, laches, in that the applicable statute of limitations in tort actions in Panama is one year, that it appears on the face of the libel that the suit was commenced more than one year after the date of the alleged injuries, and that, therefore, "it would be inconsistent to permit her to sue in admiralty with the same effect as at common law after her right to sue at common law had been barred".

This defense was by agreement separately heard and submitted.

The district judge, on the authority of *McGrath v. Panama Railroad Co.*, 298 Fed. 551, sustained the defense and dismissed the libel, and libellant is here claiming that it was error to do so.

Respondent, insisting that it was not, insists also that its motion to dismiss on the ground that the Federal Tort Claims Act provided the exclusive judicial remedy was well taken and the suit should have been dismissed on that ground.

In agreement as we are with the opinion of the district judge that laches has barred the action, we find it unneces- [fol. 48] sary to determine whether the suit should have been dismissed on the first ground urged by respondent

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want of jurisdiction of the subject matter of the suit because the Federal Tort Claims Act furnished an exclusive remedy against the United States. The second was filed Nov. 29, 1948, against the United States under the Tort Claims Act. Before that action proceeded to trial on the merits, Congress by specific amendment to Sec. 2680, Title 28 U.S.C., amended the Tort Claims Act by adding to the exclusions "(m) any claim arising from the activities of the Panama Railroad Company", and on motion the court dismissed the action for want of jurisdiction.

that libellant had no cause of action in admiralty because the Tort Claims Act furnished the exclusive remedy.

We find no error in the judgment of dismissal. It is affirmed.

[fol. 49] JUDGMENT

Extract from the Minutes of December 14, 1950

No. 13259

EVELYN C. GARDNER

versus

PANAMA RAILROAD COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Canal Zone, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered, adjudged, and decreed, by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Evelyn C. Gardner, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

EVELYN C. GARDNER, Petitioner,

vs.

PANAMA RAILROAD COMPANY

ORDER

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and it is hereby, extended to and including 29th of March, 1951.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 14th day of March, 1951.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 638

ORDER ALLOWING CERTIORARI—Filed May 21, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.